84-1938

No.

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ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GABRIEL ENERGY CORPORATION, - - Petitioner

versus

DONALD P. HODEL, Secretary of the Interior,
JED CHRISTENSEN, Acting Director, Office of Surface Mining Reclamation and Enforcement,
W. HORD TIPTON, Lexington Field Office Director, Office of Surface Mining, Reclamation and Enforcement, - - - - - Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a privately owned mineral estate in a tract in which the United States owns the surface estate is "Federal lands" as that term is used in 30 U.S.C. 1272 (e)(2) and defined at 30 U.S.C. 1291(4) and whether the provisions of 30 U.S.C. 1272(e)(2) pertaining to "Federal lands" can be applied to such a privately owned mineral estate.

II. Whether a tract referred to in Question I above but which is totally outside of a national forest boundary established by presidential proclamation is "within the boundaries of any national forest" as that phrase is used in 30 U.S.C. 1272(e)(2).*

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*The appellant in the Sixth Circuit was Gabriel Energy Corporation, the petitioner here, which has no parent companies, subsidiaries or affiliates.

The appellees in the Sixth Circuit were James G. Watt, Secretary of the Interior, the United States Department of the Interior; Andrew Bailey, Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), United States Department of the Interior; and David C. Short, Director, Region II, OSM, United States Department of the Interior. Because Secretary Hodel is the successor to Secretary Watt, Jed Christensen is the successor to Acting Director Bailey, and W. Hord Tipton, Lexington Field Office Director, OSM, is the successor to Mr. Short, we have substituted Secretary Hodel, Jed Christensen, and W. Hord Tipton as the federal parties in this case, pursuant to Rule 40.3 of the Rules of this Court.

In the Sixth Circuit, the appeal of Gabriel Energy Corporation was consolidated with two other appeals. In one, Paul Reeves, Acting Director, OSM, United States Department of the Interior, who has been succeeded in office by Jed Christensen, was an appellee and The Stearns Company and Ramex were appellants.

In the other consolidated appeal, the appellants were Walter J. Fitzmartin, Jane A. Fitzmartin, Herman Israel, and Yvonne O'Brien, Ex'x of the Estates of John F. R. Clark and Madeline Clark. That appeal was dismissed for failure to file a brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

GABRIEL ENERGY CORPORATION, - - *Petitioner*

v.

DONALD P. HODEL, Secretary of the Interior, Et Al., - - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gabriel Energy Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals was filed on January 29, 1985 (App. A, *infra,* 1a-7a) and is reported at 753 F. 2d 521. The March 15, 1985 order of the Court of Appeals denying the Petition for Reconsideration (App. B, *infra,* 8a) is unreported.

The November 3, 1981 Memorandum Opinion of the United States District Court for the Eastern District of Kentucky (App. D, *infra,* 11a-20a) is unreported. The April 1, 1983 Memorandum Opinion of the District Court denying Petitioner's Motion for Reconsideration (App. E, *infra,* 21a-29a) is unreported.

The January 23, 1981 letter of David C. Short, Director, Region II, Office of Surface Mining and Reclamation and Enforcement, to Gabriel Energy Corporation (App. F, *infra,* 30a-31a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was filed on January 29, 1985 (App. C, *infra,* 9a-10a), and a timely petition for rehearing was denied on March 15, 1985 (App. B, *infra,* 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause, U. S. Const., Art. I, Section 8, cl. 3 provides:

> The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

2. The Property Clause, U. S. Const., Art. IV, Section 3, cl. 2 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. The Due Process Clause, U. S. Const., Amend. V, cl. 4, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

4. 16 U.S.C. 471 (repealed) provides:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, and any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof. . . .

5. 16 U.S.C. 473 provides:

> The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under Section 471 of this title, from time to time, as he shall deem best for the public interests. By such modification, he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.

6. 16 U.S.C. 521 provides:

> Subject to the provisions of Section 519 of this Title, the lands acquired under Sections 513-519 and 521 of this Title, shall be permanently reserved, held, and administered as national forest lands under the provisions of Section 471 of this Title and Acts supplemental to and amendatory thereof and the Secretary of Agriculture may from time to time divide the lands acquired under the aforesaid sections into such specific national forests and so designate the same as he may deem best for administrative purposes.

7. 30 U.S.C. 1272(e)(2) provides in pertinent part:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . .
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* THAT surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—. . .;

8. 30 U.S.C. 1291(4) provides in pertinent part: For the purposes of this Chapter—

> . . .
>
> (4) "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof, except Indian lands. . . .

STATEMENT OF THE CASE

This controversy involves the construction and application of one single provision — 30 U.S.C. 1272 (e)(2) — of the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 30 U.S.C. 1201-1328 (hereinafter "Act"), where the proposed mining would occur on a tract in which the mineral estate is privately

owned and the surface estate is owned by the United States. The United States acquired its surface estate in the tract under the authority of the Weeks Act,[1] which authorizes acquisitions for national forest purposes, but the tract has not been included within the proclaimed boundary of the nearby Daniel Boone National Forest or of any other national forest.

This action was begun by the petitioner's complaint seeking declaratory and permanent injunctive relief, both of which the petitioner has continued to seek throughout this proceeding.

Beyond that basic statement of the case, however, there are other relevant matters concerning what the case involves and what it does not.

The petitioner, Gabriel Energy Corporation, is a Kentucky corporation with a leasehold interest in the

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[1]The Weeks Act of 1911, also referred to as the Appalachian Forest Act, 36 Stat. 961 as amended, 30 U.S.C. 480, 50, 513-519, 521, 552, 563 (1983 ed.), at 16 U.S.C. 518, allows the United States to acquire the surface estate in land subject to an outstanding mineral interest for the purpose of establishing the national forest where the outstanding mineral interest would "in no manner interfere with the purposes of [the national forest]." The government in acquiring forest property, sought to spread its resources and acquire as much property as it could for the least consideration necessary. In order for the government to induce the land owner to convey an interest in the property for the minimum consideration, the government found it necessary to allow certain rights to be retained. *See U. S.* v. *Nebo Oil Co.*, 90 F. Supp. 73, 99-100 (W.D. La. 1950), *Aff'd.* 190 F. 2d 1003 (5th Cir. 1951); *See also U. S.* v. *Little Lake Misere Land Co., Inc.*, 412 U. S. 580, 598-600 (1973). (Considers similar provisions authoriing government purchase of severed surface estate under Migratory Bird Conservation Act, 45 Stat. 1222, 16 U.S.C. 715, *et seq.*).

mineral estate in a tract of land located in Owsley County, Kentucky.

Gabriel's lessors own the mineral estate in the tract in fee simple. The United States owns the surface estate in the tract in fee simple.

The two estates were severed on January 31, 1957 by deed conveying the surface estate to private parties and reserving the mineral estate to the grantor. Subsequent to that severance, Gabriel's lessors acquired the mineral estate by deed on January 12, 1965. After that, the United States acting under the authorization of the Weeks Act purchased the surface estate in the tract on December 3, 1973 in a transaction involving only the United States and the then owners of the surface estate.

On July 15, 1980, the plaintiff acquired its leasehold in the mineral estate in the tract, and subsequently obtained from the State of Kentucky a permit to operate an underground mine. There is no dispute here that the surface effects of the petitioner's underground mine on the seven acre tract involved would be subject to the extent specified to the Surface Mining Control and Reclamation Act of 1977. The petitioner is not challenging the application of any provision of the Act other than 30 U.S.C. 1272(e)(2).

After the petitioner had obtained his underground mining permit from the State of Kentucky and had begun to prepare the mine site, the Secretary of the Interior, through subordinate officials, (App. F, *infra,*

30a) advised the Petitioner that the Secretary considers the mineral estate and the activity of the petitioner to be subject to the provisions of § 522 of the Act[2] and that the petitioner would not be allowed to conduct its mining operations until it had sought and obtained the Secretary's determination of either "compatibility" or "valid existing rights" pursuant to 30 U.S.C. 1272(e)(2). Faced with that application of the statute, the petitioner then brought this action.

In its opinion, the Court of Appeals says the petitioner brought its action rather than seek permits pursuant to the Act (App. A, *infra,* 4a), but no question of permits is involved in this controversy except consequentially. Petitioner does not dispute the necessity of obtaining a permit from the appropriate agency.

The thing in dispute is the respondents' insistence that the petitioner obtain from the respondents a determination of either "compatibility" or "valid existing rights."[3] Either determination would be something altogether different from and in addition to any permit that might be required.

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[2]30 U.S.C. 1272 is the codification of Section 522 of the Act.

[3]A "valid existing right" is a mere possessory interest created by statute in land owned by the United States. *Best* v. *Humbolt Placer Min. Co.,* 371 U. S. 334 (1963). It is something less than a "vested" interest held in fee for which a patent has been granted. *Stockley* v. *U. S.,* 260 U. S. 532, 544 (1923). The Secretary of the Interior has adhered to the rules of these cases and regarded the "valid existing right" as a statutory interest inferior to a legal or equitable interest in his administration of the statutes containing those terms. See Opinion by Office of the Solicitor, 88 I.D. 909, 912 (1981).

The petitioner did not choose between alternative forms of relief. The administrative procedure that the respondents would require cannot be considered until the threshold question of whether the conditions and circumstances to which those procedures would apply are present. There is no way for the petitioner or any other party to raise that question except in a proceeding such as this.

It would not matter how a determination under Section 1272(e)(2) of either "valid existing rights" or "compatibility" might be resolved in a particular instance. It begs the question to say the petitioner may pursue a determination before it has been determined that the petitioner is a member of a class that has been or can be subjected to that determination.

For that reason, it is necessary in order to analyze and understand the initial application of 30 U.S.C. 1272(e)(2) to examine the existing law governing the extent of ownership of the mineral estate and the corresponding rights and limits of the ownership of a surface estate in a severed tract of land.

The petitioner does not challenge the generally applicable permitting and performance requirements of the Act as was done in *Hodel* v. *Indiana,* 452 U. S. 314 (1981), and *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n.,* 452 U. S. 264 (1981). The petitioner seeks only to be treated under the Act in accordance with the true nature of the property interests involved.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Question I

Whether a Privately Owned Mineral Estate in a Tract in Which the United States Owns the Surface Estate Is "Federal Lands" as That Term Is Used in 30 U.S.C. 1272(e)(2) and Defined at 30 U.S.C. 1291(4) and Whether the Provisions of 30 U.S.C. 1272(e)(2) Pertaining to "Federal Lands" Can be Applied to Such a Privately Owned Mineral Estate.

A. The Definition and Nature of Property and the Estates in Land

This case involves a question of first impression of the definition and application of the term "Federal lands" as it is used in the Act. 30 U.S.C. 1272(e)(2).[4] A petition of certiorari should be granted because the decision of the Court of Appeals confuses and combines the sovereign and proprietary capacities of the United States. In reaching that decision not just the treat-

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[4]This question has not been considered by the Court. Neither *Hodel* v. *Indiana*, 452 U. S. 314 (1981), nor *Hodel* v. *Virginia Surface Min. & Reclam. Ass'n.*, 452 U. S. 264 (1981), consider the question presented here. *Hodel* v. *Indiana* considers only certain specific provisions of the Act not invloved here. Though *Hodel* v. *Virginia Min. & Reclam. Ass'n.* upholds most of the Act's provisions as a valid exercise under the Commerce Clause, the section involved here is expressly excluded from the Court's consideration and holding because of a lack of justiciable controversy on that issue where no party to that action had an interest in any land to which 30 U.S.C. 1272(e)(2) could apply. *Hodel, supra*, at 294. The fundamental question of the application of 30 U.S.C. 1272 (e)(2) is still a question of first impression and it is now factually before the Court.

ment of the property involved here, but the basic and ultimate concept of property enunciated in *U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945), and other decisions, is totally altered. That alteration in the meaning of property would impinge most immediately upon the owners of land in which the mineral and surface estates have been severed, but it would also alter the meaning of property in every situation whether minerals were involved or not, and that alteration would occur regardless of the ownership of any particular interest.

Though the whole controversy here involves only one statutory section which applies only to "Federal lands", 30 U.S.C. 1272(e)(2), which is defined as "land, including mineral interests, owned by the United States", 30 U.S.C. 1291(4), the Court of Appeals in its opinion does not consider the only controlling question raised by these statutes which is the meaning of "lands" and "ownership" and "property". The Court of Appeals appears to treat the matter as a question only of sovereign power; and without identifying or discussing it, finds that the United States sufficiently possesses it in this instance.

But that view is inapplicable and alters the property involved. That is because even though the specific rules of mineral law vary through the various jurisdictions, the basic relationship between the mineral and surface owners has been essentially the same in every state and federal jurisdiction. That basic essential relationship between the mineral owner and the surface owner is that the mineral owner may use the tract for the min-

ing of whatever mineral is involved, and the surface owner may use the tract for all other purposes not interfering with the production of the mineral. When those two uses come into conflict, the surface owner's conflicting use must yield to the mineral owner's production of the mineral — but only to that and nothing else.

That is the "servient" relationship of the surface estate to the mineral estate and that is all that it is. *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 504 (1928). If that were not so and the mineral owner were required, as the Court of Appeals decision would require, to yield to the surface owner's use, the mineral owner's only use would always have to yield and a severed mineral estate would be meaningless and could never be used.

It is not a unique relationship. It is the same relationship and the same rationale that exists in the law of easements which allows one with an easement to use a tract in a certain way even when the owner of the underlying estate in fee might otherwise make some other conflicting use of it. *See Elam* v. *Elam,* 322 S. W. 2d 703, 706 (Ky. 1959), for discussion of that relationship. An easement which could be used only when it did not interfere would be a sufferance and not an easement. The Court of Appeals decision would do the same thing to the relationship between severed surface and mineral estates.

No court has ever before gone that far. If such a rule had been followed in *Kinney-Coastal Oil Co.* v.

Kieffer, supra, the surface owner by his decision to build a town would have curtailed and perhaps precluded the production of oil and gas from the mineral estate owned by the United States. But the court did not reach that result. The court held that the *right* of the surface owner to use the tract for any purpose is limited and defined by the rights incident to the mineral estate. Those rights are inherent in the estate itself and are not something to be applied or withheld in individual cases. In *Kinney-Coastal Oil Co.* v. *Kieffer, supra* at 505, the court explained "by this suit, the plaintiffs [lessees of the mineral owner the United States] are not seeking to acquire a right to use the surface but to protect it from wrongful obstruction and impairment, the right which they already have."

It is that relationship which the decision of the Court of Appeals would alter; and wherever followed, it would alter the relationship not by announcing a new substantive rule of mineral law, but by altering the concept and meaning of property itself. All property would be affected by the consequences flowing from the change in its very nature and definition.

"Property" as a concept in the law has included every kind of right and power which may be owned and all of the constituent elements of each of them. *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268 (1933); *Bromley* v. *McCaugn,* 280 U. S. 124, 137 (1929). The term "property" is thus *nomen generalissimum. See Hoyd* v. *Citizens Bank of Albany Co.,* 89 F. 105, 107 (6th Cir. 1937); *Lucas* v. *Schneider,* 47 F. 2d 1006, 1008 (6th Cir. 1931). Property is every valuable right,

power and interest including the right of possession, *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945), the right of use, *Superior Bath House* v. *McCarroll*, 312 U. S. 176, 180-181 (1941), and the right of disposal, *Nashville C. & St. L. Ry.* v. *Wallace, supra.*

Each of those rights or attributes is a "stick" in the bundle of sticks which the courts have used by way of metephor or analogy to describe property. *See Superior Bath House* v. *McCarroll, supra;* and *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582 (1937). As the courts have used that metaphor, each attribute or "stick" is itself "property" which then by analogy comprise, in toto, "the bundle of sticks".

What "property" is not, or at least has not been, is the physical object itself. It does not matter whether the physical object is a book, an automobile, or the earth itself, the physical object is not itself "property". To refer to a physical object, even the earth itself, as "property", is merely to use a "shorthand" form for it real nature. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377-78 (1945). But when the word "property" is used to mean the physical thing itself, it is, the Court said in *U. S.* v. *General Motors Corp., supra,* "property . . . in its vulgar and untechnical sense". The real nature of property is more accurately, the ". . . rights inhering in the citizen's relation to the physical thing. . . ." *U. S.* v. *General Motors Corp., supra.*

It is on this idea of property in its "vulgar and untechnical sense" that the decision of the Court of Appeals is based. In reaching its decision, the Court

of Appeals alters both the nature of all property of all kinds and in all situations and the nature and relationship between the estates in land.

The Court of Appeals regards and treats the property involved here — the mineral estate and the surface estate — as physical things themselves, as separate and specific layers of earth lying one upon the other. The Court of Appeals misstates the petitioner's theory as ". . . they still own the 'lands' *beneath* the surface . . ." and their "proposal to mine *beneath* federal national forest lands . . ." [emphasis added]. (App. A, *infra,* 5a).

That is not the theory nor the proposal of the petitioner. The petitioner proposes to conduct mining operations on a tract in which it owns the mineral estate and in which the United States owns the surface estate. What the petitioner owns, *i.e.,* the mineral estate, is the right to use the tract, the whole tract and every part and every layer of it, to extract coal from it. What the United States owns, *i.e.,* the surface estate, is the right to use the tract, the whole tract and every part and every layer of it, for every other purpose which does not interfere with the legitimate extraction of coal. Neither the petitioner nor the United States owns just a layer of coal nor a layer of earth and rock of unspecified thickness on top of the tract.

That is the departure of the Court of Appeals from heretofore universal law. It converts the meaning of property from a specific and sometimes limited right to use the thing, or here the tract, to a specific portion of the thing or tract itself — to "property in the vulgar and untechnical" sense.

At first blush, some confusion might arise from the somewhat homonymous character of the words involved. Though the terms "surface" and "mineral" in other circumstances may have reference to physical things or features, those terms are in the context of real property "colloquial shorthand" for "surface estate" and "mineral estate" respectively. *See Shell Oil Co.* v. *Moore,* 382 Ill. 556, 48 N. E. 2d 400, 404 (1943).

It is upon the meaning and nature of the terms "mineral estate" and "surface estate" in the context of property law that the theory and proposal of the petitioner is based. Whatever that analysis and conception of property might be, it will inescapably predestine the outcome of every other question that might arise here.

The only thing to which the statute in question here, 30 U.S.C. 1272(e)(2), applies is "land . . . owned by the United States". 30 U.S.C. 1291(4). And the operative feature of the statute is the ownership or proprietary interest of the United States. Until the nature and extent of that ownership or proprietary interest of the United States is fully examined and specifically delineated, it cannot be determined whether or not there is anything involved to which the statute by its terms might apply.

In order to make that determination of whether or not the operative interest to which the statute would apply is present, there must be a proper analysis and determination of the property interests involved. Those interests and the relationship between them must

be recognized and accorded their ordinary roles in property law, or property itself must be redefined.

That redefinition is demonstrated when one considers fully, as the Court of Appeals did not, what the meaning of property and the relationships between the various interests in property has been.

When property in the form of land is severed into separate estates, each distinct estate is itself land, *British-American Oil Producing Co.* v. *Bd. of Equalization,* 299 U. S. 159, 165 (1936), and the owner of the two estates are both "landowners" equally and to the same extent. *Gabbard* v. *Sheffield,* 179 Ky. 442, 200 S. W. 940 (1918).

The mineral estate is the right to mine whatever mineral is involved. It is not merely the ownership of the mineral as it lies in place, but it is the right to go onto the tract to search for and extract minerals. *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488 (1928); *Sammons* v. *Warfield Natural Gas Co.,* 304 Ky. 548, 201 S. W. 2d 719 (1947); *Trimble* v. *Kentucky River Coal Corp.,* 235 Ky. 301, 31 S. W. 2d 367 (1930), and to all things reasonable and necessary to that end so long as that power is not used arbitrarily, oppressively or maliciously. *Jenkins* v. *DePoyster,* 299 Ky. 500, 186 S. W. 2d 14 (1945). *United Carbon Co.* v. *Webb,* 282 Ky. 79, 137 S. W. 2d 733 (1940). That right is always implied in a grant or reservation of minerals. *Central Kentucky Gas Co.* v. *Smallwood,* 252 S. W. 2d 866, 869 (1953).

The surface estate, by definition, is the correlative right to use and deal with the tract in any other way so long as it does not interfere with the legitimate exercise of those rights of the mineral estate. *British-American Oil Prod. Co.* v. *Bd. of Equalization, supra* at 165; *Kinney-Coastal Oil Co.* v. *Kieffer, supra* at 503; *Jenkins* v *DePoyster, supra* at 15.

Because of the nature of the estates in land and the relationship between them, the exercise of the rights of the mineral estate cannot be said to go on or impose on or harm the surface estate in any way. The mineral owner is not liable to the surface owner for the effects of any legitimate mining activity for, in such a situation, there is not "injury". *Transwestern Pipeline Co.* v. *Kerr-McGee Corp.,* 492 F. 2d 878 (10th Cir. 1974). *Sentry Royalty Co.* v. *Kimmel,* 461 S. W. 2d 76 (Ky. 1970); *United Carbon Co.* v. *Webb,* 282 Ky. 79, 137 S. W. 2d 733 (1940); *Case* v. *Elk Horn Coal Corp.,* 210 Ky. 700, 276 S. W. 573 (1925); *See also, Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488 (1928).

Under any body of law by which the question might be examined, it is clear that the right to go onto the tract and take the minerals is not merely a right or license which the mineral owner has at sufferance, but that it is itself a thing owned. It is one of the "sticks" in the bundle of rights. *See Commerce Union Bank* v. *Kinkade,* 540 S. W. 2d 861, 863 (Ky. 1976), *cert. denied,* 340 U. S. 915 (1977).

A mineral estate is "land" and in this particular instance it is land owned by the petitioner Gabriel

Energy Corporation. If "Federal lands" is "land, including mineral interests, owned by the United States", 30 U.S.C. 1291 (4), then the necessary corollary of that statutory definition is that "non-federal land" means "any land, including any mineral interest, *not* owned by the United States." If the privately owned mineral estate involved here is non-federal and not federal land as that term is defined at 30 U.S.C. 1291(4), then there is no nexus to connect that privately owned mineral estate to any provision of 30 U.S.C. 1272(e)(2) which applies only to "federal lands".

Treating the land involved here as "federal land" would require a novel definition of property as specific, isolated, physical portions of the tract or thing owned; or if the definition of property itself were not radically changed, the decision of the Court of Appeals, if allowed to stand, would create a situation in which the definitions and relationships attendant to the estates in land would be of one character where the United States owns the mineral estate or has no interest at all and of an opposite character where the United States owns the surface estate.

If 30 U.S.C. 1272(e)(2) is to be applied to any property other than the government's own property, i.e., "land . . . owned by the United States," that statute will have been extended beyond its own terms and beyond constitutional authority.

B. The Commerce Clause

Like all acts of Congress, the authority for 30 U.S.C. 1272(e)(2) must be found in the Constitution. *Carter*

v. *Carter Coal Co.*, 298 U. S. 238, 291 (1936). But the Constitution provides no authority for that section if it is to be construed as the Court of Appeals has construed it. Neither the Commerce Clause, U. S. Const. Art. I, Section 8, cl. 3, nor the Property Clause, U. S. Const. Art. IV, Section 3, cl. 2, nor any other provision of the Constitution will provide any such authority. On the contrary, the Constitution prohibits such a construction.

Though the power under the Commerce Clause is broad and authorizes the regulation of a great many kinds of activities, 30 U.S.C. 1272 (e)(2) does not regulate anything affecting interstate commerce or protect any interest that might be protected under the Commerce Clause. That section does not purport to regulate anything other than land owned by the United States—the ownership interest of the United States.

There is nothing to even suggest that coal produced from a tract in which the United States owns the surface estate would have an economic impact on interstate commerce distinguishable from the impact of coal produced from other lands or that the mining of coal on such a tract would be any more hazardous to the environment than mining on other lands.

Even though the Act has a general thrust of protecting the environment, Section 1272(e)(2) itself does not; and that will not justify its application to a few but not all producers of coal on private mineral estates. The statute cannot be upheld on that basis. Whatever economic or environmental condition might

be affected by the imposition of Section 1272(e)(2) would be allowed to exist unregulated on other, sometimes identical, sometimes adjacent, land in which the United States has no ownership interest.

It is that unequal treatment of the whole class of coal producers that would cause 30 U.S.C. 1272(e)(2) to fail as an exercise of the commerce power. It is not argued here that Congress may not make distinctions and classifications under the Commerce Clause;

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

F.S. Royster Guano Co. v. *Virginia,* 253 U. S. 412, 415 (1920). The Due Process Clause of the Fifth Amendment to the Constitution imposes on the federal government the same standard that is required of state legislation by the Equal Protection Clause of the Fourteenth Amendment. *Schweiker* v. *Wilson,* 450 U. S. 221, 228 (1981), and the Commerce power is subject to the due process requirement of the Fifth Amendment. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589 (1935). Because of the invalidity of the classification based only on ownership, the section would fail under the Commerce Clause.

C. The Property Clause

Because 30 U.S.C. 1272(e)(2) is a rule ". . . affecting the property of the United States . . ." the

Property Clause, U. S. Const. Art. IV, Section 3, cl. 2, applies and its requirements must be met. The sole power of congress to enact legislation that controls or affects lands owned by the United States as such comes entirely from the Property Clause and not at all from the Commerce Clause. *FPC* v. *Tuscacora Indian Nation,* 362 U. S. 99, 113-115 (1960); *FPC* v. *Oregon,* 349 U. S. 435 (1955).

The question then becomes whether the privately owned mineral estate is property which can be regulated in any way pursuant to the authority of the Property Clause.

Under the Property Clause, Congress does have great power "without limitations" to make rules for the use, occupancy and protection of land owned by the United States. *U. S.* v. *San Francisco,* 310 U. S. 16, 29 (1940); *Utah Power & Light Co.* v. *U. S.,* 243 U. S. 389, 405 (1917); *see Kleppe* v. *New Mexico,* 426 U. S. 529, 539 (1976).

It is just as clear, however, that the power under the Property Clause to regulate or control the use of property not owned is limited absolutely, "solely," to the extent necessary to protect land which is owned by the United States. *Camfield* v. *U. S.,* 167 U. S. 518, 525-526 (1897); *see also U. S.* v. *Alford,* 274 U. S. 264, 266 (1927). In *Kleppe* v. *New Mexico, supra,* at 539, which involves only public, but no private property, that principle is recognized and reiterated.

But here the exercise of the mineral estate does not imperil the surface estate owned by the United States

in any way for the lawful exercise of the mineral estate does not cause any injury to the surface estate. *E.g., Transwestern Pipeline Co.* v. *Kerr-McGee Corp.,* 492 F. 2d 878 (10th Cir. 1974).

Under this statute, only the mineral estate would be affected or regulated. The surface estate of the United States cannot be said to be regulated by 30 U.S.C. 1272(e)(2) because there is no act or occurrence that might arise in the exercise of the surface estate which is subject to the Act. Conversely, every act and occurrence which would be regulated by Section 1272(e)(2) is a lawful incident of a mineral estate. While it is recognized that the Property Clause might be invoked to regulate private property for the protection of public property owned by the United States, no such rationale is available here, unless there is a lingering insistence at odds with the law of property that the federal property—land owned by the United States—is the rocks and trees and layers of dirt upon which one can stand. Those rocks and trees and layers of dirt where one stands, however, is property only "in the vulgar and untechnical sense". *U. S.* v. *General Motors Corp.,* 323 U. S. 373, 377 (1945).

What the United States owns is a bundle of rights, none of which is a right to hold or possess the property free from legitimate mining operations or even free from those legitimate mining operations to which it might object.

This is not to say, of course, that 30 U.S.C. 1272 (e)(2) has no validity or no proper application at all.

That section provides for the management and regulation of coal which the United States itself has the right to extract or produce and from which it could, through leasing, receive a return. *See Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 503 (1928). It is only when that section would be applied to a privately owned mineral estate that its application would be invalid. See *Boddie* v. *Connecticut,* 401 U. S. 371, 380 (1971); *Watson* v. *Buck,* 313 U. S. 387, 401 (1941).

Gabriel seeks to acquire nothing new here. It seeks only to protect and enjoy that which it already owns. See *Kinney-Coastal Oil Co.* v. *Kieffer,* 277 U. S. 488, 505 (1928). Gabried does not seek to be unregulated. It seeks only to be regulated in the same way as all other owners and operators of privately owned mineral estates.

That is what it is entitled to. Whatever the authority and powers of the United States might be, the United States has no property interest in the tract involved here upon which would invoke his power under the Property Clause.

Because treatment of the land involved here as "federal lands" would redefine "property" itself, a writ of certiorari should be granted.

Question II

Whether a Tract Referred to in Question I Above But Which Is Totally Outside of the National Forest Boundary Established by Presidential Proclamation Is "Within the Boundaries of Any National Forest" as That Phrase Is Used in 30 U.S.C. 1272(e)(2).

If the "federal land" provisions discussed above were held to be inapplicable to the petitioner's mineral estate, there would be no further question here. If, however, that private mineral estate were subject to those "federal land" provisions, there would be a second part of this controversy also presents a question of first impression of national importance. The second part would concern the meaning and application of the word "boundaries" as it is used in relation to federal land in 30 U.S.C. 1272(e)(2).

The statute, 30 U.S.C. 1272(e)(2), requires the existence of two separate conditions before it may be invoked. The first condition that must exist is that the land involved be "federal lands" as noted above, and the second condition that must exist is that the land involved be "within the boundaries of any national

The tract involved is not within the "boundaries" of any national forest, but outside a national forest in an area the United States Forest Service refers to administratively as the "Redbird Purchase Unit."[5] The Court of Appeals in holding that the tract involved

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[5]The term "Purchase Unit" has no significance except to locate the property involved. Gabriel does not rely on the fact that the area involved might be referred to as a "purchase unit", nor does it rely on any use of the term "purchase unit" that the Secretary or any other officer of the government might have made.

(Continued on next page.)

here is within the boundaries of a national forest construes the term "boundary" to refer not to the exterior limit or any line or parcel or tract or location of land. The Court of Appeals construes the term "boundary" without reference to any prior use of the word. The opinion of the Court of Appeals is that because the government's interest in the tract was purchased under the authority of the Weeks Act, it is by virtue of that within the boundaries of any national forest. (App. A, *infra,* 6a-7a.)

In giving that new meaning to the word "boundaries" the Court of Appeals disregards not only the ordinary use of the word, but also the prior legislative use of the word and the law relating to that prior legislative use.

The importance of that construction of the word "boundaries" and the situation that the decision of the Court of Appeals creates is that there will either be an uneven treatment of land such as this in the various parts of the country, or that there will be an instability in any land or activity related in any way to the boundary of a National forest. Only in the context of the question as it arises here could a uniform definition of such "boundaries" be required throughout the country.

The term "boundaries" or "limits" of a national forest has a fixed and existing meaning in prior acts of

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(Continued from preceding page.)

Gabriel relies solely on the fact that the tract on which it proposes to open its mining operation is not situated within the proclaimed or proclamation boundary of the Daniel Boone or any other national forest.

Congress which is not considered in the opinion of the Court of Appeals. At 16 U.S.C. 471 and at 16 U.S.C. 473 pertaining to the establishment and modification of national forests, Congress required that the "boundaries" or "limits" of a national forest be established, changed or revoked only by presidential proclamation.

In 1911, Congress enacted the Weeks Act allowing national forests to be established on land acquired by purchase as well as on land withdrawn from the public domain. By reference, the Weeks Act at 16 U.S.C. 521, places all of the property acquired pursuant to its authority under the provisions of 16 U.S.C. 471[6] and 473.

When Congress adopted the phrase "within the boundaries of any national forest," it did so within the context of its own prior use of that word of which it was, presumptively or otherwise, aware. *Erlenbaugh* v. *U. S.*, 409 U. S. 239 (1972); *cf. Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535 (1954). The Congress, like individual citizens, is presumed to know the law

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[6]It is noted that 16 U.S.C. 471 referred to in 16 U.S.C. 521 was repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2792; 16 U.S.C. 473, however, has not been repealed. The effect of the 1976 repeal of 16 U.S.C. 471 is simply to withdraw the President's authority to establish any new national forests. The repeal has no bearing on the status of forests already established under Section 471, nor on the status of their boundaries established under that Section.

After the repeal of Section 471, national forests already established continued in their existing status as national forests and the President retained his authority to change the boundary lines already established in the manner provided in Section 473.

when it acts. *Cannon* v. *University of Chicago,* 441 U. S. 667, 697-98 (1979). When Congress adopts a new act, it is understood to be fitted into existing law. *U. S.* v. *Jefferson Elec. Co.,* 291 U. S. 386, 396 (1934).

In addition to the rule referred to above that the Congress is presumed to know and intend to follow its prior use of a term when it uses a similar term in subsequent legislation, the statutes here, 30 U.S.C. 1272(e)(2) and 16 U.S.C. 471 and 473, should be construed in *pari materia.* The statutes all refer to the same thing —"boundaries" or "limits" of a national forest—with no apparent intention to give that term two different meanings within those references, the statutes must be construed in *pari materia. Hunter* v. *Ericson,* 393 U. S. 385, 388 (1969); *U. S.* v. *Stewart,* 311 U. S. 60, 69 (1940); *U. S.* v. *Freeman,* 44 U. S. 556, 564 (1845).

There is a boundary of a national forest near the tract involved here, but the tract is outside and not inside that established boundary. The boundary of the Daniel Boone National Forest was established in accordance with the statutes authorizing the creation of that forest by presidential proclamation in 1937[7] and there has been no change in that boundary since that time that would include the tract involved here.[8] The Court of Appeals treats the phrase "within the boundaries of any national forest" as meaning any land purchased under the Weeks Act, but that is not what

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[7]Presidential Proclamations. 2 Fed. Reg. 361 (Feb. 26, 1937) and 31 Fed. Reg. 3715 (Apr. 15, 1966).

the statute says. The statute does not attach its application to any character of land. The statute does not say "Federal lands which are wooded lands or forest lands," nor "lands managed by the forest service," nor does it say "Federal lands which were acquired under the authority of the Weeks Act." The construction which the Court of Appeals gives the phrase improperly renders the word "boundary" totally inoperative and ineffective surplusage. *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U. S. 609, 634 (1973); *see also In Re Permanent Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1362 (D.C. Cir. 1980).

The authority under which the government made its purchase is just not apposite to the question of how

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[8]On June 12, 1979, the Secretary of Agriculture citing the provisions of the Weeks Act, issued a notice respecting the "boundary" of the Daniel Boone National Forest, 44 Fed. Reg. 33718 (June 12, 1979). The notice refers repeatedly to land "lying outside the existing National Forest boundary." The notice does not purport, however, to make any change in that part of the existing boundary situated in Owsley County where the tract of land involved here is situated.

Whatever the significance and status of that notice, the government recognized "the boundary of a national forest" as a definite, precise, existing thing. The notice recognizes an existing boundary and purports to make certain specified changes in it. The Gabriel leasehold property involved in this matter would not be included in the exterior lines of either the "existing boundary" or within the boundary with the purported changes referred to in that notice.

The notice of June 12, 1979, whatever its significance, thus has no bearing on this controversy except that in it the government recognizes and employs the same meaning of "boundary of a national forest" that Gabriel is asserting here.

the Congress chose, for whatever reasons, to treat its different categories of property purchased and managed under that authority.

The statute says what Congress intended, and the statute says "Federal lands" which are "within the *boundaries* of any national forest [emphasis added]." The phrase "within the boundaries of any national forest" is a fixed, precisely described, line.[9] The phrase "within the boundaries of any national forest" means the external lines of any such boundary described and proclaimed in that way.[10]

If the words Congress used in enacting 30 U.S.C. 1272(e)(2), the use and meaning which it had given those terms in prior legislation and which it presumptively knew and intended here, and indeed if those words are to have any meaning at all, and if there is to be stability throughout the country in private mineral estates in this situation and their relationship to the statute a writ of certiorari should be granted and the question considered.

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[9]Presidential Proclamation. 2 Fed. Reg. 361 (Feb. 26, 1937).

[10]*Cf.* "In view of [the] requirements of federal law, it is clear that the best evidence of the existence of a national forest, or federal forest reserve, is the President's public proclamation establishing it. . . ." *Bd. of Com'rs of Marshall Co.* v. *Snellgrove*, 428 P. 2d 272, 275 (Okla. 1967).

CONCLUSION

When the proprietary and sovereign powers of the United States are examined separately, neither is sufficient to support the construction of 30 U.S.C. 1272 (e)(2) that the Court of Appeals has given it, nor can they be combined to give sufficient authority for it.

In upholding the challenged application of that statute, the Court of Appeals has departed from the established meaning of property and its boundaries—of all property of whatever kind and whether publicly or privately owned—so that to preserve the meaning, uniformity and stability of property, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5299
No. 83-5305

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION (83-5305), - *Plaintiffs-Appellants,*

and

THE STEARNS COMPANY (83-5299), - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of Interior;
PAUL REEVES, Acting Director;
ANDREW BAILEY, Acting Director, Office of Surface Mining Reclamation & Enforcement;
DAVID C. SHORT, Region II, Office of Surface Mining Reclamation & Enforcement, - *Defendants-Appellees.*

On Appeal From the United States District Court for the Eastern District of Kentucky.

Decided and Filed January 29, 1985

Before STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

MERRITT, Circuit Judge.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

In each of these two cases against the Secretary of the Interior, a coal mining company proposes to mine coal under the surface of land owned and maintained by the federal government as forest land. The mining company claims a valid royalty lease of the mineral estate from the successor in interest of the original owner who reserved the mineral estate when he sold the fee interest in the land to the government. Each case arises under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1983). In each, the coal mining company and the owners of the underlying royalty mineral interest seek from this Court a declaratory judgment that they are entitled to mine coal under the federal lands. In one case the coal underlies part of the Daniel Boone National Forest in Eastern Kentucky, and in the other case the land is part of the so-called "Redbird Purchase Unit" near the Daniel Boone National Forest. Plaintiffs do not seek injunctive relief or damages.[1]

The 1977 Act applies to mining on both public and private lands, but the questions of interpretation and application of the Act presented by plaintiffs here relate to one of the provisions applicable only to public lands, namely § 522(e)(2), codified as 30 U.S.C. § 1272(e)(2). That section provides, with certain exceptions which we need not enumerate here, that "subject to valid existing rights," no coal mining which disturbs the surface "shall be permitted

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[1]Plaintiffs originally sought an injunction prohibiting the Secretary from interfering with their mining operations, but have not pursued this remedy. Similarly, although plaintiffs have made a Fifth Amendment takings argument, they have not sought damages at this juncture.

. . . on any federal lands within the boundaries of any national forest . . . ."[2]

Plaintiffs request a declaratory judgment holding that section 1272(e)(2) is not applicable to the mines they intend to operate and hence that the Office of Surface Mining which administers the Act may not apply and enforce this section against them. They argue that section 1272(e)(2) does not regulate their proposed mines for the following reasons: (1) section 1272(e)(2) does not cover separate mineral interests owned by private parties under federal forests but covers only surface interests; (2) unless the section is read to exclude such private mineral estates, the section constitutes an unconstitutional taking under the Fifth Amendment; (3) the mineral estate underlying the government-owned "Redbird Purchase Unit" is not covered by section 1272(e)(2) because Redbird is not a national forest.

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[2]Section 1272(e) reads as follows:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted —
>
> > (1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System . . .;
> >
> > (2) On any federal lands within the boundaries of any national forest: *provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface mining operations and —
> >
> > > (A) Surface operations and impacts are incidental to an underground coal mine;
> > >
> > > . . . .

When the Office of Surface Mining learned that the two mining companies were about to conduct underground mining operations which would disturb the surface of federal lands, the administrator gave notice that the companies are required to seek and obtain permits under the Surface Mining Reclamation Act and would be subject to the provisions of section 1272(e)(2). When plaintiffs received these notices, they filed this action for declaratory judgment in District Court rather than participate in the administrative hearing process established by the Act. The Act prohibits the mining of coal without an administrative permit, 30 U.S.C. § 1256, and provides for administrative review and adjudication of disputes arising from permit applications. 30 U.S.C. § 1264.

The District Court overruled in part the government's motion to dismiss the complaints on grounds that plaintiffs had not exhausted their administrative remedies and that their cases were not ripe for decision. Instead, the Court rendered a partial declaratory judgment construing and applying the statute. It held that the companies' mineral interests and mining operations would operate under and on federal forest lands, and were therefore governed by section 1272(e)(2) of the Act. The District Court then agreed with the government's position regarding ripeness, and ruled that it would defer to the agency's primary jurisdiction regarding plaintiffs' further claims. However, upon motion filed by the plaintiffs, the District Court dismissed the cases in their entirety so that plaintiffs could appeal from the declaratory judgment. On appeal, the government has formally waived any exhaustion and ripeness contentions to the extent that they might be interpreted to interfere with the District Court's limited declaration, and asserts that the judgment is now ripe for decision by this Court.

Plaintiffs' first argument is that the Act, and specifically section 1272(e), does not apply to them at all, because their proposed mining operations will not occur "on federal lands." Their theory is that they still own the "lands" beneath the surface, and although the federal government has been granted some rights on the surface, the lands affected by plaintiffs' mining, including the surface land necessarily disturbed by their underground mines, are wholly owned by the private plaintiffs as a matter of state law. Proceeding from this premise, plaintiffs then claim that they cannot be made to resort to the administrative procedure that the Office of Surface Mining has set up for determination of "valid existing rights," because that process necessarily assumes that the plaintiffs' operations will occur "on federal lands."

Plaintiffs' proposal to mine beneath federal national forest lands, with the conceded attendant effects on the surface of those lands, fits squarely within the common sense meaning of the phrase "on federal lands" as used in section 1272(e)(2). This is even more apparent when the definition of "surface mining" contained in the Act, *i.e.*, "surface impacts incident to an underground mine," is substituted for the phrase "surface mining" in section 1272(e). Thus, the Act and section 1272(e) apply to plaintiffs' mines. The District Court was correct in so holding.

The plaintiffs' "taking" argument is governed by the Supreme Court's decision in *Hodel* v. *Virginia Surface Mining and Reclamation,* 452 U. S. 264 (1981), a pre-enforcement challenge to the Surface Mining Act. The Court held that the Act is not facially invalid. Its "mere enactment" does not constitute a taking of plaintiffs' mineral estate. Thus, the Court upheld the Act against the same type of attack under the Fifth Amendment as plaintiffs make in the instant case.

The Supreme Court observed that "the Act does not, on its face, prevent beneficial use of coal-bearing lands," and the coal companies "cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances" because "there is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative review," 452 U. S. 296-97. The Court explains the hypothetical nature of the "taking" claims before it—"if appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached"—and concludes that "the potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Id.* at 297 (footnote omitted). The same reasoning applies in this case. The Office of Surface Mining has not yet ruled on the questions of plaintiffs' "valid existing right" to engage in underground coal mining under section 1272(e)(2). Until an administrative disposition is made of this question, we will not know the nature of the restraint imposed by the government on plaintiffs' mining operations. Thus the District Court correctly ruled that plaintiffs' takings claim was not ripe for adjudication, and deferred to the agency's jurisdiction.

We agree with the District Court that lands within the Redbird Purchase Unit are "national forest" lands within the meaning of section 1272(e)(2). "National forest" land, primarily in the west, has been set aside for many years by the President from land in the public domain under section 24 of the Creative Act of 1891, 16 U.S.C. § 471. *See United States* v. *New Mexico*, 438 U. S. 696, 705 (1978). "National forest" land within the meaning of section 1272(e) has also been acquired, primarily in the eastern section of the United States, under section 11 of the Weeks Law of 1911, 16

U.S.C. § 521, which provides that land so acquired "shall be permanently reserved, held and administered as national forest land" just as are the western lands set aside by the President under the Creative Act of 1891. Land acquired as forest land under the Weeks Act, as distinguished from land set aside under the Creative Act of 1891, need not be formally set aside and proclaimed as national forest by the President. The acquisition of the land by the United States under the authority of the Weeks Act is sufficient to designate it as "national forest."

The "Redbird" Forest in question here is a so-called "purchase unit" acquired, held and administered as "national forest" land under the Weeks Act. The District Court was therefore correct in holding that section 1272(e) regulating coal mining in national forests governs lands within the Redbird Purchase Unit.

Accordingly, the judgment of the District Court is affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION, Et Al., - - *Plaintiffs-Appellants,*

v.

JAMES G. WATT, Secretary of the Interior, Et Al., - - - - - - - - - *Defendants-Appellees.*

ORDER — Filed March 15, 1985

BEFORE: STEWART, Associate Justice (Ret.)*, ENGEL and MERRITT, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

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*Hon Potter Stewart sitting by designation from the Supreme Court of the United States.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5299/5305

RAMEX MINING CORPORATION (83-5299),
GABRIEL ENERGY CORPORATION
(83-5305), - - - - - *Plaintiffs-Appellants,*

THE STEARNS COMPANY
(83-5299), - - *Intervening Plaintiff-Appellant,*

v.

JAMES WATT, Secretary of
Interior, et al., - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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JUDGMENT—Filed January 29, 1985

Before: STEWART, Associate Justice (Retired)*, ENGEL and MERRITT, Circuit Judges.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

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*The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

It is further ordered that Defendants-Appellees recover from Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

(s) John Hehman
John P. Hehman, Clerk

Issued as Mandate: March 25, 1985

Costs: None

Filing fee .....$
Printing .....$
Total .....$

A True Copy

Attest:

(s) Nancy Schulkens
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION - - - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION - - - - *Plaintiff,*

v.

JAMES G. WATT, Etc., Et Al. - - - *Defendants.*

MEMORANDUM — Filed November 3, 1981

These matters are before the Court on various motions of the parties: the federal defendants' April 27, 1981, and May 5, 1981, motions to dismiss, their August 6, 1981, motions for summary judgment, and their August 10, 1981, motion to dismiss the intervening complaint in London Civil No. 81-12; Ramex Mining Corporation's ("Ramex's") May 21, 1981 (motion for summary judgment in London Civil No. 81-12; Stearns Coal and Lumber Company's ("Stearns' ") August 14, 1981, motion for summary judgment in London Civil No. 81-12; and Gabriel Energy Corporation's ("Gabriel's") May 26, 1981, motion for summary judgment and its August 13, 1981, motion to amend its complaint, both in London Civil Action No. 81-18. With the

exception of Gabriel's August 13 motion to amend its complaint, all the pending motions are controverted. Fortunately, in ruling on these motions, chaos may be avoided, for the arguments are severally repeated throughout the pleadings. The Court has extracted the principal arguments from the various pleadings in this Memorandum, and disposes of them in a slightly-different order than that suggested to the Court by the parties. After a review of the record and the pleadings of counsel, the Court concludes that it has jurisdiction in these matters, that the federal defendants are entitled to partial summary judgment, and that the Court should retain jurisdiction pending administrative proceedings before the Office of Surface Mining Reclamation and Enforcement ("OSM"). Since no party has objected, Gabriel will be permitted to file its tendered amended complaint. Appropriate Orders will be entered this date.

The sole issue for resolution in both matters is whether an operator seeking to mine coal pursuant to a privately held mineral estate underlying a federally owned surface estate in a national forest is conducting a surface coal mining operation on federal lands within the meaning of Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e).

I. JURISDICTION OF THIS COURT

A. *Statutory Preclusion of Judicial Review.*

The federal defendants contend that this Court lacks subject matter jurisdiction because Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), requires that this litigation be brought in the United States District Court for the District of Columbia, within 60 days after the alleged injuries, by plaintiffs who participated in the administrative process. Section 526(a)(1) is plainly ap-

plicable to any litigant seeking judicial review of the promulgation of national rules and regulations pertaining to either surface mining operations or the impacts incident to underground mining operations on federal lands. The plaintiffs' complaints and pleadings, however, evidence that the plaintiffs are not challenging either the Secretary's authority to promulgate national rules and regulations pertaining to federal lands or the validity of those regulations; rather, the plaintiffs contend simply that their private mineral estates and mining operations are not subject to the federal lands provisions of the Surface Mining Act, 30 U.S.C. §§ 1272, 1273. Since the plaintiffs are challenging the *applicability* of the federal statute and not the *validity* of the federal regulations promulgated thereunder, the Surface Mining Act's preclusion of judicial review, 30 U.S.C. § 1276(a)(1), is wholly inapplicable. Subject matter jurisdiction and venue are properly laid in the Eastern District of Kentucky. 28 U.S.C. §§ 1331, 1391(e).

The federal defendants are mistaken in their contention that the distinction between applicability and validity of federal statutes and regulations is wholly illusory. Under § 701(a)(1) of the Administrative Procedures Act, 5 U.S.C. § 701(a)(1), an agency's decisions are not reviewable when a statute precludes judicial review. Application of Section 701(a)(1) is contrary to the general constitutional presumption of reviewability of administrative action. *See, e.g., Adamo Wrecking Co.* v. *United States,* 434 U. S. 275, 289-91 (1978) (Powell, J., concurring). Where an agency is alleged to be acting outside of its mandate and the organic legislation establishing the agency also contain a statutory preclusion or limitation of judicial review, the aggrieved party has no remedy to challenge the applicability of federal regulation, unless a federal judicial forum construes the statute precluding judicial review as inapplicable. In *Adamo Wrecking Co.* v. *United States, supra,*

the Supreme Court was faced with the distinction of the applicability and the validity of federal regulations. The Court concluded that Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), the federal provision precluding judicial review under the Clean Air Act, did not apply to restrict the jurisdiction of a federal district court to determine whether federal regulation applied to the defendant's conduct in a criminal prosecution. *Id.* at 285. The Court explicitly cautioned federal district courts to avoid engaging in judicial review in a manner precluded by statutory restrictions in the organic legislation under the guise of making a determination of the applicability of federal regulation. *Id.* As the Supreme Court in *Adamo Wrecking* indicated, the distinction between the applicability and the validity of federal regulation is not illusory, and with due regard to the Supreme Court's admonition, this Court is not precluded by Section 526(a)(1) of the Surface Mining Act, 30 U.S.C. § 1276(a)(1), from exercising jurisdiction in these matters.

B. *Doctrine of Exhaustion of Remedies.*

The federal defendants contend that this Court should refrain from exercising jurisdiction in this litigation for jurisprudential considerations. They argue that the controversy is not justiciable because the plaintiffs have failed to avail themselves of all possible administrative remedies of an adverse administrative determination prior to seeking judicial review. The plaintiffs concede that they have not attempted to avail themselves of any administrative remedies to resolve these matters, but argue that the jurisprudential considerations inherent in the doctrine are irrelevant to this litigation. The plaintiffs further argue that they are under no duty to exhaust their administrative remedies because, under their interpretation of the Surface Mining Act, the agency proferring relief, OSM,

has exceeded its authority delegated to it by Congress. Plaintiffs contend it is futile for them to exhaust administrative remedies before OSM, for OSM has already determined that the plaintiffs are subject to their federal regulation pertaining to national forests. OSM's previous determination is the ultimate issue in this litigation, and that issue is currently before the Court.

It is unnecessary for the Court to determine whether the plaintiffs are under a duty to exhaust administrative remedies prior to the inception of this litigation or whether an exhaustion requirement is futile herein, for the general doctrine of exhaustion of administrative remedies before an administrative agency is subject to an exception where the principal question is solely of statutory interpretation. *McKart* v. *United States,* 395 U. S. 185, 197-99 (1969); *Frontier Airlines, Inc.* v. *CAB,* 621 F. 2d 369, 371 (10th Cir. 1980). None of the jurisprudential considerations urging restraint from the exercise of jurisdiction are applicable. The resolution of the applicability of the Surface Mining Act to the mineral estates of Ramex, Stearns, and Gabriel does not require any particular expertise unique to the OSM. *McKart* v. *United States, supra* at 198. Juducial review would not be significantly aided by any additional administrative proceedings. *Id.* at 199. Indeed, if the plaintiffs were required to pursue administrative proceedings before OSM without accruing the desired results and thereafter successfully demonstrated the inapplicability of federal regulation, the plaintiffs would suffer needless litigation expenses in the interim prior to a judgment in this forum. As in *McKart* v. *United States, supra,* there is simply no overwhelming reason for this Court to have OSM determine in the first instance whether the plaintiffs' mining operations in the Daniel Boone National Forest are subject to the Surface Mining Act.

C. *Ripeness of Compensatory Claims.*

The federal defendants contend that the plaintiffs' claims for just compensation for a deprivation of property are not ripe for adjudication. The plaintiffs concede the defendants' contention, but assert that their claims for declaratory and injunctive relief are ripe. The Court concludes that the claims for declaratory and injunctive relief are ripe, and agrees with the parties that the claims for compensation have not as yet matured. *See Hodel* v. *Virginia Surface Mining and Reclamation Association,* ___ U. S. ____, 49 U.S.L.W. 4654, 4661-62 (1981).

II. STATUTORY AUTHORTIY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS.

The task of a Court to determine whether a particular party's activity is subject to federal statutory regulation is relatively narrow. *Adamo Wrecking Co.* v. *United States, supra* at 285. The Court must first establish that Congress has the constitutional authority to regulate the specific challenged conduct. Then, the only remaining question for judicial inquiry is whether Congress has in fact chosen to regulate the specific challenged conduct. With respect to constitutional authorization, whatever doubts remain as to the constitutionality of the Surface Mining Act were laid to rest in *Hodel* v. *Virginia Surface Mining, supra,* wherein the Supreme Court concluded that Congress had not exceeded its authority under the Commerce Clause in enacting the Surface Mining Act. Both in *Hodel* v. *Virginia Surface Mining, supra, and in Hodel* v. *Indiana,* ___ U. S. ___, 49 U.S.L.W. 4667 (1981), the Supreme Court rejected broad constitutional challenges to the Act as violative of the Fifth and Tenth Amendments. Those decisions establish that Congress has the authority to enact the Surface

Mining Act, and, in particular, surface mining activities within federal lands, 30 U.S.C. §§ 1272, 1273.

It is the conclusion of this Court that Congress has chosen to regulate the conduct at issue. Section 522(e) of the Act prohibits new surface coal mining operations on federal lands within the boundaries of a national forest except where the operator can show a valid existing right to mine as of August 3, 1977. Plaintiffs contend that the regulations and requirements imposed upon "federal lands" does not apply to their interests as they own private mineral estates. If the plaintiffs were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiffs' arguments and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and this disruption is what the Act is designed to regulate. This is reflected in Section 101(c) of the Act, 30 U.S.C. § 1201(c), which states:

> Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

It appears that Congress recognized that in many instances private proprietary interests would underlie federal lands subject to the Act in issue. The legislative history of this Act demonstrates the intent of Congress to address the interests of private mineral estate holders. As stated in a Senate report concerning this Act:

> Since the mining of coal became a profitable enterprise, there have been numerous instances in which the mineral estate and the surface estates were separated, both on public and private lands. State law governs the resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such state laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights.

S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977). While the Act reflects the decide of Congress that, in most instances, mining should not take place on federal lands, an exception was provided to take into account those persons who had valid existing rights in private mineral estates lying below "federal lands." 30 U.S.C. § 1272(e). Based upon the above discussion, it is clear that the Act in issue, as it regulates mining activities on "federal lands," should be interpreted to include regulation of those private parties who seek to mine their mineral estates underlying the national forests.

All plaintiffs are declared to be conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine.

III. DEFERENCE TO THE PRIMARY JURISDICTION.

Having concluded that the plaintiffs seeking to mine coal pursuant to a privately held mineral estate underlying the federally owned surface estate in the Daniel Boone National Forest are conducting a surface coal mining operation on federal lands within the meaning of Section 522(e), 30 U.S.C. § 1272(e), any further inquiry into these matters, the extent and nature of federal regulation by the OSM, is precluded by the doctrine of primary jurisdiction. The doctrine applies whenever the enforcement of claims, originally cognizable in a federal forum, requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative agency. *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59, 63-64 (1956). "[I]n such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64 (citation omitted). This litigation concerns complicated issues of fact which are not within the conventional experience of the federal judiciary. The OSM should not be passed over, for it may provide the "[u]niformity and consistency in the regulation" of surface mining activities within the national forests. *Far East Conference* v. *United States,* 342 U. S. 570, 574 (1952). The OSM is far better equipped than this Court to ascertain and interpret the extent and validity of the plaintiff's existing rights to conduct mining operations in the Daniel Boone National Forest. This Court, however, will not sustain the federal defendants' motion in full, for if OSM's regulation of the plaintiffs' mining operations is so oppressive as to amount to a deprivation of their property interests, their Fifth Amendment claims for just compensation may become ripe for adjudication. *See Hodel* v. *Virginia Surface Mining, supra* at ...., 49 U.S.L.W. at 4661-62.

In making this ruling, the Court is making no decision as to whether underground mining would so disturb the surface as to be incompatible with the goals set out in 30 U.S.C. § 1272(e), as there have been numerous underground mines in the national forest in this area in the past.

As the orders in these cases will not be final and thus not appealable, if any party desires the Court to amend its Orders to make a finding under 28 U.S.C. § 1292(b), such a motion will be given serious consideration.

This 3rd day of November, 1981.

(s) Eugene E. Siler, Jr.
Eugene E. Siler, Jr., Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 81-12

RAMEX MINING CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

Civil Action No. 81-18

GABRIEL ENERGY CORPORATION, - - - *Plaintiff,*

v.

JAMES G. WATT, Secretary of
The Interior, et al., - - - - *Defendants.*

MEMORANDUM — Filed April 1, 1983

This matter is currently before the Court for consideration of the motion by the plaintiff, Gabriel Energy Corporation (hereinafter Gabriel), for reconsideration of the Court's Order entered November 3, 1981, whereby the defendants were granted partial summary judgment. After thorough consideration, the Court is of the opinion that its previous Order was proper and should stand. An appropriate Order denying the relief requested by the plaintiff will be entered this date. Various other motions filed on behalf of Walter Fitzmartin, Jane Fitzmartin, Herman Israel, and Yvonne O'Brien, executrix of the estates of

John F. R. Clark and Madeline Clark, and the responses thereto, will also be considered below.

In response to Gabriel's request for prompt action in this matter, this Court on November 3, 1981, addressed itself to the central issue raised by the parties. While the Court was concerned with the parties' need and desire for a quick resolution, it was also aware of the importance and long-ranging effect its decision would have. Unfortunately, over a year later the major issue raised by this matter has not been finally adjudicated.

The portion of the Court's previous opinion to which Gabriel has strenuously objected is contained within the section entitled "STATUTORY AUTHORITY TO REGULATE PRIVATE MINERAL ESTATES IN THE NATIONAL FORESTS." Specifically, the plaintiff finds exception with the Court's following statement:

> If the plaintiff were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the plaintiff's argument and recitation of the law of property would become relevant. However, common sense indicates that the plaintiffs will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and that disruption is what the Act is designed to regulate.

This statement should in no way be construed to mean that the government, by virtue of its ability to regulate mining activities on federal lands, will be able to preempt totally the plaintiff's rights in the mineral estate once valid rights are established through appropriate administrative procedures. However, at this juncture of this prcoeeding, that issue is not ripe for consideration.

The ability of the government to regulate mining activities which have an impact on federal lands within the boundaries of national forests evolves from the authority

of the Surface Mining Control and Reclamation Act of 1977 (hereinafter Act) and *not necessarily* by virtue of the fact that the government holds the interest of the surface estate which it seeks to regulate. In previously addressing this issue, Gabriel has amply set forth the law relevant to the rights held by the owner of a mineral estate as compared with the rights held by the owner of the surface estate. The Court's holding that this regulation is binding on the owner of private mineral estates, encompassing both rights on the surface and the underlying strata, does not beg the question as the plaintiff suggests. The central question becomes not whether the interest in the private mineral estate is dominant to that of the owner of the surface estate but whether the government has chosen to regulate mining upon or beneath the surface in question. After careful consideration, the Court has determined that the Act does indeed regulate such mining activity and that the definition of federal lands contained within the Act is consistent with such regulation. The legislative history of the Act supports such a finding. While the Act should not be construed to extinguish existing property rights, the government's ability to regulate as prescribed within the Act may not be ignored.

OTHER PENDING MOTIONS

On July 30, 1982, a hearing was held in this matter to allow all parties the opportunity to summarize their arguments regarding the plaintiff's motion for reconsideration. After hearing all parties, the Court granted counsel for *Amici Curiae* an additional period of five days to supplement their argument. The federal defendants were given ten days thereafter in which to advise the Court of their position as to the suggestion by Gabriel that the complaint be dismissed so that it may appeal the dispositive issue to the United States Court of Appeals for the Sixth Circuit.

Following the hearing, the *Amici Curiae* were joined as parties-plaintiff in this action (hereinafter plaintiff mineral owners). Thereafter, the following motions and responses were filed by the respective parties:

Motion for Extension of Time in which to File Supplement to the Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by the plaintiff mineral owners on August 13, 1982);

Motion to Join Parties Defendant (filed by the plaintiff mineral owners on August 13, 1982);

Request for Ruling and Judgment on Dispositive Issues in Consolidated Case (filed by the plaintiff mineral owners on August 13, 1982);

Objection to Plaintiff Mineral Owners' Motions and Request (filed by Gabriel on August 17, 1982);

Motion to Reset Time for Extension of Time for Submission of Motion for Reconsideration of Order (filed by plaintiff mineral owners on August 19, 1982);

Objection to Plaintiff Mineral Owners' Motions and Requests or Alternatively Motion for Time to Respond (filed by federal defendants on August 19, 1982);

Objection to Motion to Reset Time, etc., and Motion to Close the Record to Deny Further Filings (filed by Gabriel on August 29, 1982);

Motion to Amend Motion for Extension of Time in which to File Supplement to Record and Response to Federal Defendants' Motion to Join Parties Plaintiff (filed by plaintiff mineral owners on October 29, 1982); and

Motion for Extension of Time in which to File Response to Objection of Federal Defendants to Plaintiff Mineral Owners' Motion and Requests and Response

to Objections of Gabriel to Motion and Request and Motion to Reset Time, etc., and Motion (filed by plaintiff mineral owners on October 29, 1982).

Initially, the Court must note that it does not look with favor upon the delays which have resulted from the various late filings by the plaintiff mineral owners. However, after reviewing these materials, the Court concludes that none of the parties herein will be prejudiced by allowing the materials submitted by the plaintiff mineral owners to be considered. For the sake of clarity and brevity, all materials heretofore tendered by the plaintiff mineral owners will be allowed to be filed. Objection to these materials by the remaining parties will be overruled. Further, the Court does not deem it necessary to require the remaining parties to address any new matter which may have been raised by these materials. Therefore, the Court will proceed to address the issues raised by the plaintiff mineral owners.

Before considering the gravamen of the plaintiff mineral owners' supporting authority, the Court will address the motion to add additional defendants. After reviewing the materials submitted by the parties in regard to this issue, the Court finds the plaintiff mineral owners' motion to add additional defendants to be improper. The movant has not shown to the satisfaction of the Court that the failure to add the Secretary of the Department of Agriculture and the Chief of the Forest Service will impair or impede the parties' ability to protect their respective interests or subject any party to a substantial risk of an inconsistent obligation. Rule 19(a), Fed. R. Civ P. Thus, the motion to add additional defendants to this action will be denied.

As set forth in the affidavit of counsel for the plaintiff mineral owners, their interest in this litigation arises by

virtue of the fact that they own in fee simple the mineral estate in approximately 9,000 acres of land wherein the surface estate is owned by the United States. These 9,000 acres are located within the Redbird Purchase Unit, although not specifically designated as a part of the Daniel Boone National Forest. The crux of their argument centers on the issue of whether purchase units should be considered as being included within the definition of national forests as set forth in section 522(e) of the Act, 30 U.S.C. § 1272(e). The Court has reviewed the materials submitted by the plaintiff mineral owners and finds much of it to be inconclusive as to the issue herein being considered. A review of the legislative history and the various enactments creating and affecting the national forest lands convinces the Court that the position set forth and argued by the plaintiff mineral owners is erroneous.

The Court is also unpersuaded by the plaintiff mineral owners' argument that, inasmuch as the various agencies of the defendants have made a distinction, via their regulations, between national forests and purchase units, they are now bound by their regulations, citing inter alia, *United States* v. *Nixon*, 418 U. S. 683 (1974). The Court has reviewed this issue and finds that the differences which exist are merely for administrative convenience and do not alter the intent of Congress.

In pertinent part, section 522(e) of the Act provides:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> . . . (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* that surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values

> which may be incompatible with surface mining operations. . . .

30 U.S.C. § 1272(e). Examination of the legislative history of this section is relevant in resolving the issue herein being raised by the plaintiff mineral owners. The Conferees' Report states at Cong. Rec. 38281 (Dec. 5, 1974):

> 7. Designation of Areas Unsuitable for Surface Coal Mining.—Both the Senate bill and House amendment provide for the establishment of a process by which regulatory authority could designate land areas as unsuitable for the surface mining of coal. In addition to the prohibition of surface mining which may result from the operation of the designation process, certain outright prohibitions were included in the Senate bill and House amendment. Thus both the Senate bill and House amendment would prohibit new surface coal mining operations on lands within the National Park System, the National Wilderness Preservation System and the House amendment contained additional bans applicable to the National Forest System (including national grasslands) and alluvial valley floors.
>
> The conferees adopted certain of the statutory prohibitions (e.g., lands within the National Park System, National Wildlife Refuge System, National Wilderness System), and modified others (rejected the prohibition applicable to national grasslands but retained a ban on National Forests). . . .

Although this proposed Act eventually received a presidential veto, the prohibitions contained in the 1977 Act are the same. The intention of Congress clearly appears to be the protection of all areas of the National Forest System with the exclusion of the national grasslands. This intent would

be frustrated were the Court to adopt the meaning urged by the plaintiff mineral owners. The term National Forest System has been defined by the plaintiff mineral owners as follows:

> All National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and Land Utilization Projects administered under Title III of the Bankhead-Jones Farm Tenant Act (citations omitted) and other lands, waters, or interests therein which are administered by the Forest Services or are designated for administration through the Forest Service as a part of the system.

This definition, taken from Forest Service Manual 5405.4 is also included within the definition cited by the defendants taken from the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended, 16 U.S.C. § 1609(a). Either definition is broad enough to include purchase units which were acquired pursuant to the Weeks Act of 1911. Therefore, even if national grasslands are excluded from coverage as reflected by congressional intent, purchase units remain and are protected by section 522(e).

Additionally, unlike purchase units which may, in time, be designated as a specific national forest, national grasslands do not have national forest status. While they are administered by the Forest Service and are a part of the National Forest System, their acquisition arose from the Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010. Contrary to the Weeks Act which has as a primary purpose proper timber management and protection of waterways and watersheds, the Bankhead-Jones Farm Tenant Act was designed primarily to restore soil management and prevent soil erosion in areas of the Midwest and Great Plains which

had resulted from improper land use. While exclusion of national grasslands from section 522(e)(2) of the Act does not frustrate the intent of the Act, exclusion of purchase units from this same section would frustrate the intention of the Weeks Act as well as the Surface Mining Control and Reclamation Act of 1977.

Based upon a plain reading of the statutory section as well as its underlying legislative history, the Court finds that areas designated as purchase units come within the meaning of national forests as set forth in section 522(e)(2) of the Act. Further, after considering all parties' respective position regarding dismissal of this action so that an appeal may be taken and finding the issues considered herein to be dispositive, this matter will be dismissed this date by separate Order, as the Court finds that the plaintiffs are conducting underground coal mining operations which come within the provisions of 30 U.S.C. § 1272(e), as they involve surface operations and impacts incident to an underground coal mine. Moreover, in accordance with the oral motion by the plaintiff, judgment will be entered denying the plaintiffs' claims of a taking, as they are not ripe for adjudication. *Hodel* v. *Virginia Surface Mining,* 452 U. S. 264 (1981).

This 1st day of April, 1983.

(s) Eugene E. Siler, Jr., Judge

APPENDIX F

[LETTERHEAD OF UNITED STATES DEPARTMENT OF THE INTERIOR]
January 23, 1981

Mr. Douglas Arnett
Gabriel Energy Corporation
Route 1, Box 476
Oneida, Kentucky 40972

Dear Mr. Arnett:

Thank you for meeting with us on the 20th regarding Permit No. 0955003. I am especially grateful for your notifying me of the commencement of the referenced operation.

As I indicated at that time, because this operation is being conducted on Federal (surface) land in the Daniel Boone National Forest, either a determination of valid existing rights or a compatibility finding is required before it may be performed lawfully. These requirements are found in Section 522(e) of the Surface Mining Control and Reclamation Act of 1977.

Your discontinuing the operation and stabilizing the mine site pending the determination of the issues involved and your all-around candor and good faith are both commendable and very much appreciated. You may rest assured that I and my staff look forward to providing you with whatever assistance you require as you work toward resolving these matters.

Sincerely yours,

(s) David C. Short
David C. Short
Regional Director

cc:

William H. Gorin, Esquire
Stites, McElwain & Fowler
500 McClure Building
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In the Supreme Court of the United States

OCTOBER TERM, 1985

THE STEARNS COMPANY, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

GABRIEL ENERGY CORPORATION, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. 1272(e)(2), which prohibits, with certain exceptions, "surface coal mining operations * * * on any Federal lands within the boundaries of any national forest," applies to a privately-held mineral estate underlying a federally-owned surface estate within a national forest.

2. Whether Section 522(e)(2) of the Surface Mining Act applies to lands that were acquired under Section 11 the Weeks Act of 1911, 16 U.S.C. 521, to be permanently reserved, held, and administered as national forest lands, but which are not within the boundaries of a national forest established by presidential proclamation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) [1] is reported at 753 F.2d 521. The opinions of the district court granting partial summary judgment for the government (Pet. App. 8a-17a) and denying petitioners' motion for reconsideration (Pet. App. 18a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on January 29, 1985, and a petition for rehearing was denied on March 15, 1985 (Pet. App. 30a).

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 84-1877.

The petitions for a writ of certiorari in both cases were filed on June 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1272(e), provides in pertinent part:

> After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—
>
> * * * * *
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—
>
> (A) surface operations and impacts are incident to an underground coal mine[.]

2. Section 701(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1291(4), provides in pertinent part:

> "Federal lands" means any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof * * *.

3. Section 11 of the Weeks Law (Weeks Act of 1911), 16 U.S.C. 521, provides as follows:

> Subject to the provisions of section 519 of this title the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section

> 471 of this title and acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

4. Section 21 of the Creative Act of 1891, 16 U.S.C. (1970 ed.) 471 (repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792), provided in pertinent part as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

5. The Act of June 4, 1987, 16 U.S.C. 473, provides as follows:

> The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under section 471 of this title, from time to time as he shall deem best for the public interests. By such modification he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. 1201 *et seq.*, establishes "a nationwide program to protect society and the environment from the adverse effects of surface

coal mining operations," including surface operations and surface impacts incident to underground coal mines. Sections 102(a) and 701(28), 30 U.S.C. 1202(a) and 1291(28). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 268-269 (1981). It is the express purpose of the Act to "wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." Section 102(m), 30 U.S.C. 1202(m).

One of the means selected by Congress to effectuate the goals of the Surface Mining Act involves the designation of areas unsuitable for surface coal mining. Section 522, 30 U.S.C. 1272. Section 522(e) of the Act, 30 U.S.C. 1272(e), contains a general prohibition on certain public and private surface coal mining operations, including operations on lands within the boundaries of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, and "on any Federal lands within the boundaries of any national forest." This prohibition, however, does not apply to surface coal mining operations in existence on August 3, 1977, and is also "subject to valid existing rights." 30 U.S.C. 1272 (e)(2). Furthermore, surface coal mining operations may be permitted on such lands if the Secretary of the Interior "finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and [the] surface operations and impacts are incident to an underground coal mine." 30 U.S.C. 1272 (e)(2) and (A). See also 30 C.F.R. 761.11.

2. In 1937, the United States acquired the surface estate to a tract of land in McCreary County, Kentucky, from petitioner Stearns Company. The acquisition was made pursuant to the Weeks Act of 1911, ch. 186, 36 Stat. 961 *et seq.,* as amended by the Clarke-McNary Act,

16 U.S.C. 515, which authorizes the United States to purchase land to be held as national forest lands.[2] Petitioner Stearns reserved the mineral estate and, in 1980, leased a portion of its mineral interests to petitioner Ramex Mining Corporation. When the Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement (OSM), learned that petitioners Stearns and Ramex were proposing to conduct underground mining operations that would disturb the surface of the tract, which is situated in the Daniel Boone National Forest, petitioners were notified that their proposed activities were subject to Section 522(e) of the Surface Mining Act.

Petitioner Gabriel Energy Corporation is a Kentucky corporation with a leasehold interest in the mineral estate in a tract of land located in Owsley County, Kentucky. In 1973, the United States acquired the surface estate to the tract of land pursuant to the Weeks Act and the Clarke-McNary Act. The tract is situated in the Redbird Purchase Unit and administered by the Department of Agriculture's Forest Service. It is not, however, within the proclaimed boundaries of any specifically-named national forest.

In January 1981, OSM advised Gabriel that its proposed mining activity was subject to Section 522(e)(2) (84-1938 Pet. App. 30a-31a). In response, Gabriel filed this action in the United States District Court for the Eastern District of Kentucky, seeking a declaratory judgment that its proposed mining operations are not subject to Section 522(e)(2) because the operations will not occur "on Federal lands." At about the same time, a similar action was brought by Ramex. In support of

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[2] The Acts authorize the government to purchase only the surface estate in order to reduce the costs of acquisition whenever such purchases do not impair the purposes of the Acts. See 16 U.S.C. 518; 84-1938 Pet. 5 n.l.

their contention that Section 522(e) is inapplicable to their proposed mining operations, petitioners Ramex and Stearns, which intervened as a party plaintiff in the action brought by Ramex, argued that the reservation of a mineral estate under Kentucky law includes the right to utilize the surface to the extent necessary to extract underground coal. Consequently, petitioners contended that OSM cannot require them to demonstrate that they either possess "valid existing rights" or are otherwise exempted from the general prohibition of Section 522(e) prior to disturbing the federal surface estate.

3. The district court consolidated the two cases and rejected petitioners' reading of Section 522(e) as contrary to the language and legislative history of the Surface Mining Act (Pet. App. 8a-17a). Relying on this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra,* the district court first held that Congress has the constitutional authority to regulate the challenged conduct (Pet. App. 13a-14a). Second, the court found that Congress had in fact chosen to regulate the specific conduct at issue (*id.* at 14a):

> If the plaintiffs were able to remove the minerals in question without disturbing the surface, clearly "federal lands," the [petitioners'] arguments and recitation of the law of property would become relevant. However, common sense indicates that the [petitioners] will by necessity disturb the surface of "federal lands" by either underground or surface (especially) mining and this disruption is what the Act is designed to regulate.

The district court further noted that Congress recognized that in many instances private proprietary interests would underlie federal lands subject to the Surface Mining Act, but nevertheless directed in Section 522(e)(2) that, with the exceptions provided and subject

to valid existing rights, mining should not take place on federal national forest lands (Pet. App. 15a, 19a-20a).[3]

Petitioners moved for reconsideration, renewing their argument that Section 522(e)(2) is inapplicable to privately-held mineral interests. In addition, petitioner Gabriel raised a new argument, contending that the tract at issue in its case is not "within the boundaries of any national forest" because the tract is located within the Redbird Purchase Unit but not within the specifically-designated Daniel Boone National Forest. The district court rejected both contentions (Pet. App. 18a-27a). With respect to the "boundary" argument, the court held that the exclusion from Section 522(e)(2) of purchase units, which are part of the National Forest System and which in time may be designated as specific national forests, "would frustrate the intention of the Weeks Act as well as the Surface Mining Control and Reclamation Act of 1977" (Pet. App. 26a).

The court of appeals (Stewart, Associate Justice (Retired), Engel & Merritt, JJ.) affirmed (Pet. App. 1a-7a). Noting "the conceded attendant effects on the surface of [the federal national forest] lands," the court of appeals held that petitioners' mining proposals "fit [] squarely within the common sense meaning of the phrase 'on federal lands' as used in section 1272(e)(2)" (Pet. App. 5a). The court of appeals also concluded

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[3] The district court also held that the Act's requirement that judicial review of the validity of federal regulations be sought only in the United States District Court for the District of Columbia (Section 526(a)(1), 30 U.S.C. 1276(a)(1)) was inapplicable because petitioners were challenging the applicability of the statute itself and not the validity of any regulations promulgated thereunder (Pet. App. 9a-11a). The court additionally found that petitioners need not exhaust their administrative remedies, that any taking claims were not yet ripe, and that OSM has primary jurisdiction over the extent and nature of federal regulation of petitioners' proposed activities (*id.* at 11a-17a).

(*id.* at 6a-7a) that Section 522(e)(2) governs lands within the Redbird Purchase Unit insofar as they were acquired, held, and administered as "national forest" lands under Section 11 of the Weeks Act, 16 U.S.C. 521.[4]

ARGUMENT

The decision of the court of appeals, which petitioners correctly note (84-1938 Pet. 9 & n.4) involves an issue of first impression, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. a. The argument that is common to both petitions is that the proposed mining activities do not constitute "surface coal mining operation[s] * * * on * * * Federal lands within the boundaries of [a] national forest" because the mining of the subsurface mineral estate will not occur "on Federal lands." Petitioners assert that the "common sense" reading given Section 522(e)(2) by the district court and the court of appeals is contrary to both the statute's language and legislative history. In addition, petitioners claim that federal regulation of privately-held mineral estates underlying federally-owned surface estates within a national forest is contrary to "universally accepted property law principles" (84-1877 Pet. 17) and is in conflict with petitioners' "absolute right to mine" (*id.* at 26). Finally, petitioners argue that, if in fact Section 522(e)(2) does encompass private mineral interests underlying national forest lands, then the statutory provision is unauthorized by the Commerce and Property Clauses of the Constitution and constitutes a "unilateral[ ] conscript[ion] [of]

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[4] The court of appeals additionally affirmed the district court's rulings that the Surface Mining Act is not facially invalid and that any taking claims were not ripe for adjudication (Pet. App. 5a-6a).

property rights" (84-1877 Pet. 21). Each of these contentions is wholly without merit.[5]

b. Petitioners contend (84-1877 Pet. 5) that "Congress meant to limit the application of Section [522(e)(2)] to those lands in which the United States has a proprietary interest in the minerals, rather than have it apply to lands owned by private individuals." In support of their contention, petitioners point to the Act's definition of the term "Federal lands" as "any land, including mineral interests, owned by the United States." Section 701(4), 30 U.S.C. 1291(4). It is beyond cavil, however, that federally-owned surface estates are "Federal lands."

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[5] Both petitions raise essentially the same arguments regarding the applicability of Section 522(e)(2). Petitioner Gabriel Energy Corporation, however, does make a somewhat broader assertion that "the [decision of the] Court of Appeals alters both the nature of all property of all kinds and in all situations and the nature and relationship between the estates in land" (84-1938 Pet. 13-14). It is clear, however, that Congress recognized that state law governs disputes involving the respective property rights of the owners of mineral and surface estates. See S. Rep. 95-128, 95th Cong., 1st Sess. 56 (1977) ("[T]his Act does not attempt to tamper with such State laws."). But this case is not a property dispute involving the United States in its proprietary capacity; rather, the dispute concerns the regulatory scope of a statute. The legislative history indicates that certain private rights were to be accommodated through the mechanism of a "valid existing rights" determination, to which Section 522(e) 's prohibitions are subject. By holding that privately-held mineral estates located within national forests fall under Section 522(e)(2)'s regulation of mining activities "on Federal lands," the court of appeals did not, as Gabriel suggests (84-1938 Pet. 23), treat privately-held mineral estates as "federal lands" and "redefine 'property' itself." Instead, the court upheld the power of Congress to regulate surface mining operations that "result in disturbances of surface areas that burden and adversely affect commerce * * * by destroying or diminishing the utility of land for * * * forestry purposes." Section 101(c), 30 U.S.C. 1201(c). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277.

Furthermore, as noted by the court of appeals (Pet. App. 5a), "surface mining" as defined by the Act includes "surface impacts incident to an underground coal mine." Section 701(28)(A), 30 U.S.C. 1291(28)(A). Thus, Section 522(e)(2) provides that, subject to valid existing rights and with the exceptions provided, no underground coal mining that has surface impacts shall be permitted on federally-owned surface estates within the boundaries of any national forest. Section 522(e)(2), as fairly read by the district court and the court of appeals, consequently does encompass petitioners' proposals to extract coal beneath national forest lands.[6]

Moreover, the court of appeals' interpretation of Section 522(e)(2) is consistent with the purposes Congress sought to promote in enacting the Surface Mining Act. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983). The surface estates overlying petitioners' mineral interests were acquired pursuant to Sections 6 and 11 of the Weeks Act, ch. 186, 36 Stat. 962 and 963, and Section 6 of the Clarke-McNary Act, ch. 348, 43 Stat. 654, which authorize the purchase of forest lands for the purposes of promoting the navigation of streams and the production of timber. 16 U.S.C.

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[6] Petitioners' reliance on Kentucky property law ignores the district court's point that "[t]he central question * * * [is] whether the government has chosen to regulate mining [of private coal] upon or beneath the surface [of national forest lands]" (Pet. App. 20a). Even if an owner of a mineral estate may be deemed under Kentucky law to go " 'on' his own land" when he goes on the physical surface to remove the coal (84-1877 Pet. 10), the rights that are granted mineral owners under state law cannot alter the fact that such mining operations occur "on" national forest lands and are therefore within the scope of Section 522(e)(2).

515, 521. As Congress declared in Section 101(c) of the Surface Mining Act, 30 U.S.C. 1201(c):

> [M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for * * * forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, * * * and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

The court of appeals' interpretation of Section 522(e)(2) gives effect to the congressional purposes behind the Surface Mining Act by requiring operators who seek to extract privately-held minerals "on any Federal [national forest] lands" first to demonstrate either a "valid existing right" to engage in mining operations or, absent such a right, that the proposed surface operations and impacts are incident to an underground coal mine and that such surface operations are compatible with significant recreational, timber, economic, or other values.[7]

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[7] Petitioners' interpretation of Section 522(e)(2), in contrast, imputes to Congress the intent to leave federal surface estates within national forests unprotected from mining operations conducted without any prior determination that the operator possesses a valid existing right to extract the underlying minerals. It has been estimated that more than 30%, or 8,000,000 acres of national forest lands, are underlain with private minerals. Affidavit of Rodney F. Young, Acting Director, Lands Staff, U.S. Dep't of Agriculture, Forest Service (Exhibit B to Federal Memorandum in Response to Plaintiff's Motion for Summary Judgment (filed July 17, 1981)).

The holding of the court of appeals is further supported by the legislative history of Section 522(e). In enacting that Section, Congress imposed a broad prohibition on surface coal mining operations on specified federal lands. See H.R. Conf. Rep. 95-493, 95th Cong., 1st. Sess. 111 (1977) ("Both the Senate amendment and the House bill contained similar provisions barring strip mining in national forests with limited exceptions."). The scope of Section 522(e)(2), however, is subject to valid existing rights, as noted in S. Rep. 95-128, 95th Cong., 1st Sess. 94-95 (1977):

> This subsection [522(e)] would prohibit new surface coal mining operations on lands within * * * National Forests * * *.
>
> All of these bans listed in subsection (e) are subject to valid existing rights. This language is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of [522(e)] is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

Congress thus intended that Section 522(e)(2) would prohibit the mining of private mineral estates underlying national forest lands, but provided that all valid existing property rights would be preserved. The requirement that operators demonstrate the possession of valid existing rights before commencing surface mining

operations on national forest lands underscores the intent of Congress to regulate private mineral interests pursuant to Section 522(e)(2).[8]

Petitioners assert (84-1877 Pet. 13-14) that the legislative history of the Surface Mining Act indicates that there was no intention on the part of Congress "to interfere with the rights of private mineral estate owners to extract their coal under state law." The legislative materials relied upon do reflect Congress's concern for the preservation of valid existing property rights. See H.R. Rep. 95-218, 95th Cong., 1st Sess. 189 (1977) ("[N]or is the legal right to mine the coal in any way modified if such right existed prior to enactment of the Act."); S. Rep. 95-128, *supra*, at 56 ("[A]ll valid existing property rights must be preserved."). By inserting the exception for "valid existing rights" into Section 522(e)(2), Congress intended to protect private owners of minerals underlying federal surface estates.[9]

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[8] Contrary to petitioners' protestations (84-1877 Pet. 15), the application of Section 522(e)(2) to privately-held mineral estates within national forests will not cause "the existing system of property rights [to] be thrown into total disarray." If operators do possess the rights that petitioners claim are granted mineral owners under Kentucky law, they need only demonstrate their valid existing right to mine under state law prior to conducting their proposed mining operations. While it is not clear that mineral owners do in fact enjoy an "absolute right to mine" (84-1877 Pet. 26), see *Commerce Union Bank* v. *Kinkade*, 540 S.W.2d 861, 864 (Ky. 1967), cert. denied, 430 U.S. 915 (1977); *United States* v. *Stearns Co.*, 595 F. Supp. 808, 812-813 (E.D. Ky. 1984), that issue is not presented by this case because petitioners assert that they may mine the coal in question without any prior determination of valid existing rights.

[9] It is clear from congressional reports accompanying predecessor bills to the Surface Mining Act that when Congress inserted the exception for valid existing rights in its prohibition on mining within national forests, it was aware of the concept of severed surface and mineral estates. See H.R. Rep. 94-1445, 95th Cong., 2d Sess. 47 (1976); H.R. Conf. Rep. 93-1522, 93d Cong., 2d Sess. 85-86 (1974).

It did not intend, however, to leave national forest lands unregulated and open to surface coal mining operations without any prior showing of a valid existing right to mine.[10]

Petitioners also argue (84-1877 Pet. 18-23) that, if Section 522(e)(2) is applied to privately-held mineral interests, it is an invalid exercise of the authority granted Congress by the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and the Property Clause, U.S. Const. Art. IV, § 3, cl. 2. Although this Court, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 275-283, rejected the claim that the Surface Mining Act is beyond the scope of congressional power under the Commerce Clause, petitioners argue (84-1877 Pet. 18) that "*Hodel* simply has no application to the issue presented here." The fact remains, however, that the Court there recited a provision (Section 101(c), 30 U.S.C. 1201(c)) which declares, inter alia, that "many surface mining operations result in disturbances of surface areas that burden * * * commerce * * * by destroying or diminishing the utility of land for * * * forestry purposes," and held that "[t]his congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause" (452 U.S. at 281). This holding applies to Section 522(e)(2) as well as to the rest of the Act. What this Court refrained from deciding in *Hodel* was

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[10] The fact that Congress, in S. Rep. 95-128, *supra*, at 56, proposed "some departure from existing practice" when the federal government owns the coal but not the surface does not support petitioners' argument (84-1877 Pet. 11 (emphasis and citation omitted)) that Section 522(e)(2) by negative implication was not intended to regulate mineral owners in the converse situation. The "departure" referred to related to an entirely separate issue, *i.e.*, whether western surface owners of formerly public land should be given some power of prior consent over the issuance of leases for the mining of federally reserved coal. S. Rep. 95-128, *supra*, at 56. See Section 714, 30 U.S.C. 1304.

whether Section 522(e)(2) effects an unconstitutional taking in violation of the Just Compensation Clause of the Fifth Amendment. 452 U.S. at 293-297. Yet petitioners contend (84-1877 Pet. 8) that they are *not* at this time challenging Section 522(e) on the ground that it amounts to a deprivation of their property interests.[11] Petitioners' Commerce Clause arguments—that there is no interstate basis upon which to justify Section 522(e) and that Section 522(e) "does not impinge in an equal way on all persons similarly engaged in interstate commerce" (84-1877 Pet. 19, 20)—have been previously addressed and rejected by this Court. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. at 281 (Surface Mining Act protects interstate commerce); *Hodel* v. *Indiana,* 452 U.S. 314, 331-332 (1981) (claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact).[12]

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[11] Despite their assertion that no taking claim was before the court of appeals, petitioners now argue (84-1877 Pet. 21-24) that, by upholding Section 522(e), the court of appeals has authorized the United States "to unilaterally conscript property rights" (84-1877 Pet. 21). As noted by the district court (Pet. App. 13a), the court of appeals (*id.* at 6a), and this Court in *Hodel,* 452 U.S. at 296 n.37, petitioners' taking claim is premature beause petitioners have not availed themselves of the opportunities provided under the Surface Mining Act to obtain a waiver from the restrictions imposed by Section 522(e). See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* No. 84-4 (June 28, 1985).

[12] Because Section 522(e) constitutes a valid exercise of Congress's power under the Commerce Clause, there is no need to address petitioners' Property Clause argument. As held by the district court, "[t]he ability of the government to regulate mining activities which have an impact on federal lands within the boundaries of national forests evolves from the authority of the [Act] and *not necessarily* by virtue of the fact that the government holds the interest of the surface estate which it seeks to regulate" (Pet. App. 19a-20a (emphasis in original)).

2. Petitioner Gabriel Energy Corporation contends (84-1938 Pet. 24-29) that, because the tract on which it proposes to conduct mining operations is situated in the Redbird Purchase Unit, it is not subject to Section 522(e)(2). Although petitioner recognizes that the issue is whether Congress chose to treat "purchase units" similarly to specially-named national forest lands for purposes of regulation under Section 522(e)(2), petitioner makes no attempt to ascertain the congressional intent behind the extension of Section 522(e)(2) to "surface coal mining operations * * * on any Federal lands within the boundaries of any national forest * * *." Instead, petitioner asserts (84-1938 Pet. 26-27) that Section 522(e)(2) should be read in pari materia with 16 U.S.C. (1970 ed.) 471 and 16 U.S.C. 473, which require that the "boundaries" or "limits" of public lands set apart and reserved as national forests be established, modified, or revoked by presidential proclamation.

The legislative history of Section 522(e)(2), however, clearly indicates that Congress did not intend to exclude non-designated lands acquired pursuant to the Weeks Act, which are by law "national forest" lands, but instead used the phrase "within the boundaries of any national forest" to exclude national *grasslands* from the purview of Section 522(e). National grasslands are a part of the "national forest system" administered by the Forest Service. See Section 31 of the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1010. Consequently, the predecessor to Section 522(e)(2), S. 425, 93d Cong., 2d Sess. (1974), which originally prohibited surface mining operations in, inter alia, the "National Forest System," included national grasslands. The Conference Committee changed the reference to the National Forest System to the present language "on any Federal lands within the boundaries of any national forest" in order to exclude national grasslands from the ambit of the sur-

face coal mining prohibition. H.R. Conf. Rep. 93-1522, 93d Cong., 2d Sess. 53, 78 (1974).

In contrast to the distinction made between national grasslands and national forests, *no* distinction was made by Congress between designated and non-designated national forests for purposes of regulation of surface coal mining. Pursuant to Section 21 of the Creative Act of 1891, 16 U.S.C. (1970 ed.) 471 (repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792), the President was authorized to create national forests by setting aside and reserving lands from the public domain by proclamation. Land set aside from the public domain under the Creative Act of 1891 needed to be formally proclaimed in order to give notice that the reserved land was no longer open to entry under the public land laws. Lands acquired by purchase under the Weeks Act, however, do not require a formal presidential proclamation because their boundaries are determined by the terms of the acquisition. Once lands are acquired under the Weeks Act, the President may divide and designate the lands into specifically-named national forests. The Secretary of Agriculture also has been given that authority. 16 U.S.C. 521. What is important to note is that, while Congress has not required that lands acquired under the Weeks Act be designated as specific national forests, the Weeks Act does mandate that such lands "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. 521. The periodic naming of the acquired lands by the President or the Secretary of Agriculture does not, therefore, alter their legal status.

Section 522(e)(2) of the Surface Mining Act does not refer to the "proclaimed" boundaries of any national forest. The only distinction drawn by Congress between national forest lands turns on geographic location. See

Section 522(e)(2)(B), 30 U.S.C. 1272(e)(2)(B) (surface coal mining operations permitted under certain circumstances in national forests west of the 100th meridan). Lands acquired under the Weeks Act are national forest lands with boundaries whether or not the President or the Secretary of Agriculture has placed the lands into a specifically-named national forest. The court of appeals correctly held that the tract in question, part of the Redbird Purchase Unit acquired, held, and administered as national forest land under the Weeks Act, is subject to the prohibitions of Section 522(e)(2) of the Surface Mining Act.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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No. 84-1938

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GABRIEL ENERGY CORPORATION, - Petitioner

versus

DONALD P. HODEL, Secretary of the Interior, Et Al. - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY FOR PETITIONER

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether a privately owned mineral estate in a tract in which the United States owns the surface estate is "Federal lands" as that term is used in 30 U.S.C. 1272(e)(2) and defined at 30 U.S.C. 1291(4) and whether the provisions of 30 U.S.C. 1272(e)(2) pertaining to "Federal lands" can be applied to such a privately owned mineral estate.

II. Whether a tract referred to in Question I above but which is totally outside of a national forest boundary established by presidential proclamation is "within the boundaries of any national forest" as that phrase is used in 30 U.S.C. 1272(e)(2).

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GABRIEL ENERGY CORPORATION, - - *Petitioner*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR PETITIONER

STATUTORY PROVISIONS INVOLVED

30 U.S.C. 1257 provides in pertinent part:

> (b) The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain among other things —
>
> (1) The names and addresses of (A) the permit applicant; (B) every legal owner of record of the property (surface and mineral), to be mined; (C) the holders of record of any leasehold interest in the property; (D) any purchaser of record of the property under a real estate contract; and (E) the operator if he is a person different from the applicant; and (F) if any of these

are business entities other than a single proprietor, the names and addresses of the principals, officers, and resident agent;

(2) the names and addresses of the owners of record of all surface and subsurface areas adjacent to any part of the permit area;

* * *

(9) the applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: PROVIDED, That nothing in this chapter shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.

* * *

REPLY FOR PETITIONER

QUESTION I

The Government says that Gabriel Energy Corporation's (Gabriel) privately owned mineral estate is "federal land", i.e., "any land, including mineral interests, *owned by* the United States [emphasis added]". Gabriel says its privately owned mineral estate is not federal land. That is the whole issue.

Though the applicability of the Section in question, 30 U.S.C. 1272(e)(2, is expressed solely in terms of property and proprietary interests, the Government would have the character of the property interests involved ignored. The Government's only response to the essential property question is by its conclusory assertion that the Property Clause (and thus necessarily the character of the property interest involved) does not apply to the proprietary standard set out in the statute. Respondent's Brief at 15.

The Government does discuss the property question as if the interests involved were two separate layers of earth, one lying on top of the other, but it cites no authority at all for that definition of property which in total opposition to all of the state and federal authority which has been cited in the Petition.

Gabriel's interest does not "underlie" the federal interest. Each is a separate and distinct interest in a single tract and the two interests mutually define one another. The United States does own the surface estate unquestionably, but that is not the topmost layer of earth as the Government implies. The description of the interests involved is not just a form of expression. Unless the legal interest to which the statute is directed is correctly identified, the object to which Congress applied the statute cannot be reached.

In its discussion of the character of the property interests involved, Gabriel has not used the word ''absolute'' though the Government responds as if it had and as if that word were critical and the whole argument.

Respondent's Brief at 8. The Government seems to treat the word "absolute" as if the Petitioner were claiming that it may, whenever it wishes, act out some unbridled whimsy. Gabriel, of course, makes no such claim.

Though the word "absolute" is not itself essential, the rights which Gabriel has asserted are, however, "absolute" in the sense that they are property rights. If property and property interests do not have a fixed character and meaning, then there is no such thing as property. Indeed, a right, whether a property right or not, which has no fixed reliable meaning and character would be no right at all. It would be nothing more than a mere rhetorical device of no genuine legal or social significance.

At page 10 of the Government's Response in responding to the Stearns and Ramex Petition, the Government claims that the Petitioners seek to have Kentucky law somehow change the federal law. Gabriel certainly makes no such effort. Gabriel seeks nothing more than to be regulated in the same way that all other owners of privately owned mineral estates are regulated.

By its own words, the statute, 30 U.S.C. 1272(e)(2), applies only to certain property interests. Kentucky law defines the property interests involved and Kentucky law is cited for that purpose and that purpose alone. Without reference to the definition of the thing to which the statute applies, no rational application of the statute could be made.

While deprecating the reference to Kentucky law, the Government has ignored the parallel reference to federal law in the Gabriel Petition (84-1938) which defines the property interests involved in just the same way as Kentucky law does.

There is no question of changing the statute involved, but a determination must be made under existing law of what property or property interests come within its terms.

The Government would dispose of all the questions concerning the character of property and its treatment under the Property Clause by a single unsupported assertion that a "claim of arbitrariness cannot rest solely on a statute's lack of uniform geographical impact." Respondent's Brief at 15. Gabriel has not based any claim on a lack of geographic impact. There is no question of geographic impact relevant to this controversy. Geography is not involved.

There is nothing in the statute involved here that would apply to specifically designated regions. *Sec. of Agriculture* v. *Central Roig Ref. Co.,* 338 U. S. 604 (1950); nor does it apply throughout the various states where it is invoked. *Clark Dist. Co.* v. *Western Md. R. Co.,* 242 U. S. 311 (1916); nor does it apply to specific physical features that occur with varying frequency in different parts of the country. *Hodel* v. *Indiana,* 452 U. S. 314, 332 (1981). The distinction of the statute involved here is based solely on ownership, not on geography. It applies only to certain property which a single owner owns an interest. It

does not apply to forests generally wherever they might be. It does not even apply to all property within the proclaimed boundaries of the national forest. It applies only to certain land owned by the United States. The fact that all land owned by the United States is located somewhere does not make the distinction geographic. If that were a geographic distinction, every classification that might ever be made would be geographic and thus valid because everybody and everything must be domiciled or located somewhere. The issues involved here were not involved in *Hodel* v. *Indiana,* 452 U. S. 314. That case dealt only with general provisions. *Hodel* did not consider any classification based on ownership.

The classification involved here would fail under the Commerce and Due Process Clauses for the reasons discussed in Gabriel's Petition (84-1938) and the single effort of the Government to denominate it a geographical classification will not save it.

Because the statute involved here, would apply to activity on federal land and to nothing else, the statute must be examined as an exercise of the Property Clause and its application must meet the requirements of the Property Clause.

The Government continues to argue that the "taking claim is premature". Respondent's Brief at 15. But there is no taking claim. Gabriel commenced its action in the District Court, not in the Court of Claims; it has never made a claim for compensation. Gabriel's complaint prays only for a declaration of rights and a

permanent injunction. That is all Gabriel has ever sought and that is what it is seeking now. The Government's reference to *Williamson County Regional Planning Comm's* v. *Hamilton Bank,* No. 84-4 (June 28, 1985), Respondent's Brief at page 15, is totally inapposite because the issues involved in that case are not involved here. That case involved a claim for compensation and this case does not. The Government's reference to the Compensation Clause is a red herring that would draw attention away from the genuine issues before the Court.

The Government argues as if all it seeks is to have Petitioner make a "prior showing" of its right to mine. Respondent's Brief at 11. That is not what is involved here. The Act* requires that every permit application made to any regulatory authority show the applicant's right to mine and the instrument which is the source of that right. 30 U.S.C. 1257(b)(1), (2) and (9). Gabriel has done that. What the Government is actually seeking is to convert the vested property interest in which the Petitioner has a leasehold converted into a "valid existing right" which it has defined as "a statutory interest inferior to a legal or equitable interest" subject to the discretion and policy of the Secretary of Agriculture. Opinion by the Office of the Solicitor, 88 ID 909, 912 (1981), cited in Gabriel Petition at page 7 (84-1938).

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*Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201-1328.

The issue here clearly is whether or not the Petitioner's privately owned mineral estate will be treated as "land owned by the United States".

The Government's argument is that any question of whether or not the statute is applicable in this instance can be avoided simply by applying the statute. The Government argues that by forcing the Petitioner to seek a determination applicable only to federal land any question of whether or not federal land involved is rendered unnecessary. That argument begs the question. The only question here is whether or not the Petitioner's private property can be treated as land owned by the United States and subjected to determinations applicable only to land owned by the United States or whether that question can be avoided altogether by disregarding the authority which the Petitioner has cited and summarily treating the property as if it were land owned by the United States.

QUESTION II

In discussing the boundary question in Argument II, the Government would somehow find the intent of the Congressional Act without any reference to the law regarding the reading and resolving of statutes. Respondent's Brief at 16-18.

The Congress has previously fixed the meaning of "boundary" of a national forest as the boundary established by presidential proclamation. It is not the naming of the forest, but the establishment of the boundary by presidential proclamation that is relevant here. When Congress used the phrase "boundaries of any

national forest", 30 U.S.C. 1272(e)(2), it made a distinction between inside and land outside that boundary. That is the only distinction that it made.

CONCLUSION

Indeed, that is the approach the Government has taken to the entire controversy. The Government would assume new meanings for the established words that Congress has used in the statute and then consider the words isolated from the body of law that has established the meaning.

The unwillingness of the Government to deal with issues in this controversy demonstrates the extent and depth of the controversy: It demonstrates that the real thing in issue is the definition of property, whether involving mineral rights or not, and the radical change that would come into the concept of property if the decision of the Court of Appeals is upheld. For that reason, a writ of certiorari should be granted.

Respectfully submitted,

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